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SIXTH REPORT ON STATE RESPONSIBILITY

by

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I. INTRODUCTION

1. The present report deals with a number of issues relating to the dispute settlement provisions which are to be embodied in Parts Two and Three of the State responsibility project, in conformity with the orientation which the Commission has adopted since 1985-1986. We refer to the important choices made in the 1985-1986 and 1992-1993 debates concerning the matter, and particularly to the Commission's decisions to refer to the Drafting Committee, first, our predecessor's draft article 10 of Part Two and draft articles 1 to 5 and the annex of Part Three 1/ and, subsequently, draft article 12 of Part Two and draft articles 1 to 6 and the annex of Part Three, as proposed by the present Special Rapporteur. 2/

2. Article 12 of Part Two was formulated by the Drafting Committee at the forty-fifth session. 3/ However, a further study of the matter carried out by the Special Rapporteur, including a reappraisal of some shortcomings of his own original formulation of article 12, leads him to believe that some of the issues touched upon by the reformulation of the 1993 Drafting Committee, or left out thereof, could usefully be reconsidered. This in the light of both the problems left unresolved in that formulation - too many key sentences which, inter alia, have remained between square brackets - and the problems arising from the

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1/ Yearbook of the International Law Commission, 1986, vol. II (Part One), document A/CN.4/397 and Add.1, chap. I.A.

2/ A/CN.4/444.

3/ The draft article reads as follows:

"1. An injured State may not take countermeasures unless:

(a) It has recourse to a [binding/third-party] dispute settlement procedure which both the injured State and the State which has committed the internationally wrongful act are bound to use under any relevant treaty to which they are parties; or

(b) In the absence of such a treaty, it offers a [binding/third-party] dispute settlement procedure to the State which has committed the internationally wrongful act.

"2. The right of the injured State to take countermeasures is suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased.

"3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures."

relationship between article 12 of Part Two, on the one hand, and Part Three as proposed in 1993, on the other.

3. The relationship between the pre-countermeasures settlement obligations set forth in article 12 and the post-countermeasures settlement obligations dealt with in Part Three was stressed last year by some of the members of the Drafting Committee. Those members actually suggested that article 12 would be more effectively considered together with Part Three. However, the fact that the proposed Part Three was referred to it only at a later stage prevented the 1993 Drafting Committee from taking that course. Indeed, article 12 of Part Two and the provisions of Part Three are functionally distinct and interrelated at one and the same time and it is possible that some misunderstanding of the role of article 12 (as opposed to that of Part Three) did arise in the 1993 Drafting Committee. The 1994 Drafting Committee, which will have before it the draft articles of Part Three, could more appropriately consider both sets of provisions at the same time.

4. Considering that the Commission did not debate, at the forty-fifth session, the consequences of the international "crimes" of States contemplated in article 19 of Part One of the draft, the Special Rapporteur cannot avail himself at this time of the guidance he expected from the Commission on the many difficult issues illustrated in Chapter II of his fifth (1993) report (A/CN.4/453/Add.3). However, he intends to briefly address those issues in an addendum to the present document.

5. The present report consists of two chapters. Chapter II is devoted to a reappraisal of the solutions so far envisaged for pre-countermeasures dispute settlement provisions, namely the 1993 Drafting Committee's formulation of article 12 and the proposals of the present Special Rapporteur and his predecessor concerning the said settlement provisions. Chapter III, to be issued in an addendum to the present report, is to be devoted to the consequences of international crimes referred to in paragraph 4 supra.

II. PRE-COUNTERMEASURES DISPUTE SETTLEMENT PROVISIONS SO FAR ENVISAGED FOR THE DRAFT ON STATE RESPONSIBILITY: A REAPPRAISAL

A. The formulation adopted by the 1993 Drafting Committee for article 12 of Part Two of the draft articles

1. Paragraph 1 (a) of article 12 as formulated by the 1993 Drafting Committee

6. By far the most important feature of the 1993 Drafting Committee's formulation of article 12 is the abandonment of that main point of both the 1985-1986 and 1992 proposals which was the prior exhaustion of available dispute settlement procedures as a condition of lawful resort to countermeasures. According to the 1993 Drafting Committee's formulation, "An injured State may not take countermeasures unless: (a) it has recourse to a [binding/third-party] dispute settlement procedure", etc. Nothing being said about the time element, it seems that it is up to the State which resorts to countermeasures to choose

the moment when it complies with the requirement in question. In other words, recourse to such means could well accompany or follow, instead of preceding, resort to countermeasures. 4/

4/ The formulation adopted by the 1993 Drafting Committee for article 12 marks thus a significant departure from the proposals made by the previous Special Rapporteur in 1985-1986 and the present Special Rapporteur in 1992, both referred to the Drafting Committee. It will be recalled that paragraph 1 (a) of draft article 12, as proposed in 1992, provided that no countermeasures shall be taken by the injured State "prior to: (a) the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter and any other dispute settlement instrument to which it is a party" (A/CN.4/444, para. 52). The envisaged dispute settlement procedures thus included all the means listed in Article 33 of the Charter, from the simplest forms of negotiation to the most elaborate judicial settlement procedures.

By making the concept of "available" procedures all-embracing instead of confining it, as had been envisaged by the previous Special Rapporteur, to third-party settlement procedures susceptible of being unilaterally initiated, paragraph 1 (a) of article 12 was intended to cover any dispute settlement obligations deriving, for the injured State, from any sources other than the State responsibility convention.

On the other hand, the severity of this requirement was considerably attenuated by the exceptions spelled out in paragraph 2 of the same draft article, according to which the condition of prior recourse to dispute settlement procedures would not apply: "(a) where the State which has committed the internationally wrongful act does not cooperate in good faith in the choice and the implementation of available settlement procedures; (b) to interim measures of protection taken by the injured State, until the admissibility of such measures has been decided upon by an international body within the framework of a third-party settlement procedure; (c) to any measures taken by the injured State if the State which has committed the internationally wrongful act fails to comply with an interim measure of protection indicated by the said body."

These exceptions, unfortunately, did not receive, in our view, adequate consideration in the 1993 Drafting Committee. The same must be said about the condition of "adequate response" in draft article 11. These and other elements of flexibility are discussed in paras. 64 ff. infra.

While in the course of the 1992 debate many members of the Commission found merit in the attempt to strengthen the requirement of prior resort to amicable means of settlement, some members viewed the requirement as too strict. They objected, in particular, to the extension of the requirement to all available procedures, to the vagueness of the concept of "availability" and to the term "exhaustion": three points on which some adjustment could be sought despite the necessity not to detract unduly from Article 2, paragraph 3, and Article 33 of the Charter (as read, for example, in the Friendly Relations Declaration). The said points are considered infra, paras. 64 ff.

7. A less pessimistic reading seems indeed to be suggested in the statement of the Chairman of the 1993 Drafting Committee. According to that statement, the Drafting Committee found it preferable "not to spell out the temporal element in the text and had opted for a formulation which emphasized the conditions that had to be met from the start in order for resort to countermeasures to be lawful". 5/ (emphasis added). However, this seems to be an understatement of the legal impact of a provision in which nothing is said about the temporal element. That omission would inescapably be understood in the sense that, in so far as article 12 is concerned, the temporal relationship between resort to countermeasures and recourse to dispute settlement procedures would be immaterial; it would be left to the discretion of the allegedly injured State.

8. To the abandonment of the prerequisite of resort to dispute settlement procedures, one must add that further major change (from both original proposals) which is the narrow definition of the sources of the dispute settlement obligations of which the injured State should take account. The dispute settlement procedures to be resorted to would be, according to article 12 (1) (a), those which the States involved "are bound to use under any relevant treaty to which they are parties" (emphasis added).

9. If one reads this provision in conformity with the ordinary concept of legal relevance, one should conclude that a relevant treaty would be any treaty in force between the parties binding them to have recourse to amicable means, namely means, so to speak, "short" of unilateral countermeasures. If such were to be the case, the loose obligation deriving from the temporally undetermined requirement of recourse to dispute settlement procedures would become at least less vague in its object, namely, the dispute settlement procedures to be used. These would include - subject to the further specifications provisionally enclosed in square brackets and to which we shall refer below - any dispute settlement procedures that the parties may be bound to use under any dispute settlement treaties, such as the Charter of the United Nations, multilateral regional dispute settlement arrangements and, of course, bilateral instruments of arbitration, conciliation and/or judicial settlement. 6/ Considering that a dispute over an international tort would be a legal dispute, there would be a high degree of probability that one or more of such multilateral or bilateral treaties would meet the "relevance" requirement.

10. However, it appears that this was not the intent pursued by the members of the Drafting Committee who were successful in including the word "relevant" in paragraph 1 (a). First of all, it is not certain that the expression "relevant treaty" would also cover the Charter of the United Nations, an instrument generally referred to by its name. Secondly, in the statement of the Chairman of the 1993 Drafting Committee quoted above, the "word 'relevant'" (to be further elaborated on, presumably, in the commentary to the article before its

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5/ A/CN.4/SR.2318.

6/ The definition of the dispute settlement procedures to be used would thus be analogous - mutatis mutandis - to the definition resulting from the term "available" used in draft article 12 (1) (a) as proposed by the Special Rapporteur in 1992.

adoption in plenary) "refers to a treaty applicable to the area to which the wrongful act and countermeasures relate" (emphasis added). In other words, the only treaties relevant for the purpose of the injured State's loose dispute settlement obligation would be those covering the subject-matter affected by the wrongful act and the countermeasures in question in each concrete case. If such was to be the reading of paragraph 1 (a) of article 12, the injured State would be entitled to completely disregard, for the purposes of resort to countermeasures, not only Article 2, paragraph 3, and indeed the whole Chapter VI of the Charter of the United Nations but also any general treaties of conciliation, arbitration or judicial settlement in force between the parties, not to mention the general declarations of acceptance of the jurisdiction of the International Court of the Justice under Article 36, paragraph 2 of the Statute of the Court (the so-called "optional clause"). There would only remain the compromissary clauses embodied in the treaties covering the area or matter affected by the wrongful act and the countermeasures in question. We wonder whether the Drafting Committee really intended to go so far in the restriction. It is true that under Article 103 of the Charter, the dispute settlement obligation under Article 2, paragraph 3, would prevail over the obligations under the State responsibility convention. It would, however, be highly regrettable for the International Law Commission to present States with a draft lending itself to interpretations that would make it incompatible with fundamental provisions of the Charter.

11. Although the statement of the Chairman of the 1993 Drafting Committee is, in a very broad sense, a piece of "authentic" interpretation of the provision in question, one cannot but wonder on what basis, once the text had been adopted in a convention, it could be said, for example, that a general treaty envisaging compulsory conciliation, arbitration or judicial settlement ("compulsory" meaning that the procedure can be initiated by unilateral request or application) is not "relevant" for a dispute, simply because the dispute happens to involve an alleged international tort. The same question could be asked with regard to a case where the dispute over the wrongful act in question were indisputably covered by a jurisdictional link between the allegedly injured State and the allegedly law-breaking State by virtue of their acceptance of the optional clause of the ICJ Statute.

12. Considering, however, that the text under review has been presented in those terms by the Chairman of the Drafting Committee, it would be difficult to expect that a broad interpretation of the term "relevant" could prevail in the plenary unless the matter was taken up again in depth therein and referred again to the Drafting Committee for a clarification of the text. The text should also be clarified with regard to the apparent omission of any reference to the Charter: an awkward gap in a project emanating from an organ of the United Nations.

13. The restriction deriving from the term "relevant" qualifying the treaties of which the injured State must take account for the purposes of paragraph 1 (a) of the 1993 Drafting Committee's article 12 would be further aggravated if one accepted in particular as "authentic" also that part of the explanation offered by the Chairman of the Drafting Committee which consists of the phrase "area to which the wrongful act and countermeasures relate" (emphasis added). If the "and" means what it ordinarily means, the treaty should be doubly relevant, both

to the wrongful act and the countermeasures. One wonders, therefore, quid juris where "wrongful act" and countermeasures fall in different areas. Considering that most countermeasures do not belong to the class of the so-called "reciprocity" measures, the possibility of non-coincidence is far from remote. So, what if the two areas are subject to different settlement regimes? What, in particular, if the wrongful act's area or subject-matter is covered by a compromissary clause and the countermeasure is not, or vice versa? We wonder, again, what was the intention behind the above-mentioned phrase - another point that could be usefully clarified by the 1994 Drafting Committee.

14. If the term "relevant" were to remain in paragraph 1 (a) of article 12 as adopted by the 1993 Drafting Committee, the future State responsibility convention might well amount to a major weakening, if not partial abrogation, of amicable settlement obligations existing between the parties to that convention.

15. Authorizing countermeasures implies authorizing non-compliance with international obligations as a means of coercing a party in a dispute over cessation/reparation of a tort. To do so without providing at least for prior compliance with existing settlement instruments would put into question, albeit indirectly, the obligations deriving from such instruments. The entry into force of a State responsibility convention could thus mark a step backwards in the law of amicable settlement and the Commission would as a result contribute, in this area, to a regressive development of international law. We will return to this most crucial matter below. 7/

16. Going back to that even more crucial aspect of the 1993 Drafting Committee's formulation which consists in the abandonment of the requirement of "prior recourse to dispute settlement procedures", an explanation of that significant change of approach is to be found in the above-mentioned statement of the Chairman of the Drafting Committee to the plenary. After noting that the "point most widely discussed" in the Drafting Committee "was whether or not the use of a settlement procedure should necessarily precede resort to countermeasures" and adding, even more importantly, that "the first solution ... was unquestionably preferred by a large number of members" (emphasis added), the Chairman stated that a different choice had prevailed in view of the fact that the preferred solution (i.e. prior recourse to a settlement procedure) "might ... give rise to several problems", namely: (a) a requirement of prior recourse "would be unjustifiable in cases where the internationally wrongful act continued"; (b) that requirement would not take account of the fact that "'interim measures of protection', such as freezing assets, etc., might have to be taken by the injured State without prior recourse to a settlement procedure"; and (c) there were, according to "some members", situations (outside those of a continuing tort and interim measures of protection) "in which it would not always be justified to require that resort to dispute settlement should precede the taking of countermeasures". 8/

7/ Infra, paras. 50-63.

8/ A/CN.4/SR.2318, pp. 8-9.

17. Since these were the reasons behind the important choice that was made, it seems appropriate, for a proper understanding of the text, to take a closer look at them. 9/

18. To begin with the first point, the continuing tort hypothesis should not exclude, in our view, the possibility that the State responsibility project envisage in principle an obligation, on the part of an allegedly injured State, to have recourse to dispute settlement procedures prior to resort to countermeasures.

19. In the first place, not all breaches of international obligations are of a continuing character. Even if the requirement of prior recourse to dispute settlement procedures had to be waived for continuing breaches - a point which is less certain than it may seem at first sight - it is difficult to see why it should not be insisted upon at least for non-continuing breaches.

20. Secondly, it is far from certain that the requirement of prior recourse to dispute settlement procedures could not usefully be extended to continuing breaches. It must not be overlooked that although one speaks, for the sake of brevity, of the "injured State" and the "State which committed the internationally wrongful act" it would be more correct always to speak - or at least to think - in terms of allegedly injured and allegedly law-breaking States. As no certainty exists at the outset as to whether a wrongful act has been or is being committed by the allegedly law-breaking State, one should only speak, until the issue is resolved in one way or another, of an alleged obligation to cease and an alleged obligation to provide reparation. Now, there is really not much difference, from this viewpoint, between cessation and reparation. They are both the object of a claim on the part of one or more allegedly injured States. It follows that in most cases of ordinary breaches (and except for interim measures of protection), an immediate resort to countermeasures is not necessarily more justified for cessation of a continuing breach than it is justified for reparation of a completed breach. In both cases, resort to countermeasures should be preceded in principle not only by a demand but also by an attempt at dialogue and possibly settlement by amicable means. For a continuing breach - as well as for urgent reparation of a very serious breach - the answer should be interim measures, about which something must at this point be said.

21. Regardless of the preceding considerations, an injured State's obligation of prior recourse to amicable means must not necessarily be viewed as absolute in any case. Whether the alleged tort is a completed or a continuing one, some room should be left for any measures which may be necessary in order to ensure a provisional protection of the right of the allegedly injured State. It is true that interim measures are not easy to define - a point to which we shall return

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9/ One might thus have a better chance properly to understand what was meant in the statement quoted when it described the adopted text of paragraph 1 (a) as emphasizing "the conditions which must be met from the start for countermeasures in order for resort to countermeasures to be lawful" (ibid., emphasis added).

further on 10/ - but the difficulty of so doing (not tackled by the 1993 Drafting Committee any more than by the plenary) was surely not a justification for abandoning - for either kind of alleged breaches - any idea of a prior recourse to dispute settlement procedures.

22. As acknowledged by the Chairman of the Drafting Committee in his statement, the draft article proposed in 1992 did provide for the interim measures exception to the general rule of prior recourse to dispute settlement procedures. Paragraph 2 (a) of that draft article stated that the "condition [of prior recourse to legally available dispute settlement provisions] does not apply ... (b) to interim measures of protection taken by the injured State, until the admissibility of such measures has been decided upon by an international body within the framework of a third party settlement procedure". According to the statement of the Chairman of the Drafting Committee, "the Special Rapporteur had, admittedly, addressed [the issue of unilateral protection measures] by way of an exception ... to the general rule of prior resort ... However, the Drafting Committee did not find it appropriate to follow that approach in view of the vagueness of the concept of 'interim measures of protection taken by the injured State'". 11/ It seems odd, however, that while interim measures were thus rejected (because of the vagueness of the concept), that notion was in practice maintained, as indicated in the quoted statement of the Chairman of the Drafting Committee, within the framework of the Drafting Committee's own reasoning.

23. Indeed, it is difficult to see in what sense the vagueness of the concept of interim measures could have induced the Drafting Committee to dispose of the problem of continuing breaches by abandoning the requirement of prior recourse to dispute settlement procedures. The lamented, and partly unavoidable, vagueness of the concept of interim measures as used by the Special Rapporteur could only favour the position of the allegedly injured State. The vaguer the concept of interim measures, the greater the possibility for the latter to avail itself of the exception to the requirement of prior recourse. Assuming that one considered this to be undesirable, one should have made at least an attempt to reduce the uncertainty surrounding the concept, but nothing of the kind was done. It is therefore even more difficult to understand how the 1993 Drafting Committee could have been persuaded instead that the broadness of the interim measures exception to a requirement of "prior recourse" (particularly in the case of a continuing breach) should be remedied, for any kind of breach, by a total abandonment of that requirement.

24. Coming now to the third reason indicated, we find it difficult to understand in what situations, aside from continuing breaches and other cases calling for interim measures, "some members" believed that "it would not always be justified to require that resort to dispute settlement should precede the taking of countermeasures". Again, it is difficult to see why, if the requirement of prior recourse could not be made into a steadfast rule, exceptions could not have been provided either by permitting possibly better

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10/ Paras. 75 ff. infra.

11/ A/CN.4/SR.2318, pp. 8-9.

defined interim measures of protection or by expressly allowing any kind of countermeasures whenever the allegedly law-breaking State failed to "cooperate in good faith in the choice and the implementation of available settlement procedures" (as envisaged in paragraph 2 (a) of the draft article) proposed in 1992 by the Special Rapporteur. One fails to see in what sense the opposite approach, i.e. setting aside any idea of prior resort to amicable means relying exclusively on the discretion of the allegedly injured State was viewed as inescapable.

25. In addition to the abandonment of the requirement of prior recourse to dispute settlement procedures (contemplated in 1985-1986 and in 1992), the 1993 Drafting Committee formulation presents other very important features to which the Commission may wish to give some further thought.

26. Closely related to the abandonment of the prior recourse requirement is the elimination of any obligation for the allegedly injured State to inform the allegedly wrongdoing State of its intention to apply countermeasures. Paragraph 12 (1) (b) of the draft article proposed by the Special Rapporteur in 1992, a simplification of the previous Special Rapporteur's very detailed provisions on notification, enjoined the injured State not to resort to countermeasures prior to giving "appropriate and timely communication of its intention" to the wrongdoing State. The point was presumably not considered by the 1993 Drafting Committee for lack of time.

27. Another important point is the failure of the 1993 formulation to meet the problem of defining, in addition to the "relevant treaties", the nature of the dispute settlement procedure which an allegedly injured State should have recourse to. As indicated by the presence of square brackets in the relevant parts of paragraph 1 (a) and (b), not to mention, at this point, paragraph 2, the text of the 1993 Drafting Committee leaves that issue open for the plenum of the Commission to decide. More than three possibilities must thus be envisaged.

28. One alternative would be that paragraph 1 (a) and paragraph 1 (b) envisage any amicable dispute settlement procedures, ranging from ordinary negotiation, mediation and conciliation to arbitration, judicial settlement and recourse to universal or regional political bodies. A second alternative would be that both paragraph 1 (a) and paragraph 1 (b) envisage only third-party settlement procedures including, however, both binding and non-binding procedures. This alternative would encompass conciliation as well as arbitration and judicial settlement. A third possibility (judging from the words within square brackets) would be that both paragraph 1 (a) and paragraph 1 (b) only envisage, as the object of the injured State's rather loose obligation of recourse to amicable means, binding third-party procedures, namely arbitration and judicial settlement only.

29. These are, however, not the only possibilities. As rightly noted in the statement of the Chairman of the 1993 Drafting Committee, some members of the Drafting Committee favoured one solution for paragraph 1 (a) and a different

solution for paragraph 1 (b). 12/ Such a diversification would open the way to an additional number of alternatives.

30. For the sake of brevity, we shall confine ourselves to the three main alternatives.

31. If article 12 (1) (a) and (b) were to be read in such a broad sense as to cover all dispute settlement procedures, it would subject the injured State's discretion to a degree of restraint relatively close, mutatis mutandis, to that envisaged in draft article 12 as proposed by the Special Rapporteur and referred to the Drafting Committee in 1992. The amicable settlement effort obligation would extend in principle to any dispute settlement procedures, from mere negotiation to any kind of judicial or political, binding or non-binding third-party procedures.

32. Two capital differences would, however, still distinguish the formulation of the 1993 Drafting Committee from the 1985-1986 and 1992 proposals which were both before it. One difference is, of course, the crucial, already noted disappearance of the requirement of the prior recourse to dispute settlement procedures. 13/ The injured State would remain free to determine whether recourse to amicable means should precede, accompany or follow resort to countermeasures. The second, equally crucial difference resides in the likely loosening of the already loose obligation of the injured State which would derive from the expression "relevant treaty" discussed above. The injured State's obligation might prove to be very limited indeed. It would encompass neither the means provided for by such general instruments as the Charter nor the means provided for by general, bilateral or multilateral dispute settlement treaties. The prior, contemporaneous or subsequent recourse to such procedures would only be mandatory, according to article 12 (1) (a), to the extent that it was obligatory under the compromissary clause of the treaty allegedly infringed by the wrongful act and the countermeasures.

33. The requirement of recourse to dispute settlement procedures would be even less strict if article 12 (1) (a), as adopted by the Drafting Committee in 1993, was to be read, under the second and third alternatives, as referring to third-party procedures only or, even worse, to binding third-party procedures only. Considering the further limitation deriving from the proposition that the requirement of resort to dispute settlement procedures refers only to those procedures envisaged by "relevant" treaties, in the presumably narrow sense of

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12/ If, for example, paragraph 1 (a) envisaged any dispute settlement procedure while subparagraph 1 (b) only envisaged third-party procedures, or vice versa, and paragraph 2 envisaged one or the other, or even a third solution. The possible combinations would be obviously very numerous.

13/ The question whether the requirement should be spelled out in terms of recourse, implementation or "exhaustion" (the latter concept appearing in the draft article proposed by the Special Rapporteur in 1992) should be more carefully debated than it has so far in the Commission. See infra, paras. 64-83.

that term, the obligation of the injured State would be far narrower than the obligation that the same provision would envisage in the first alternative. A fortiori, it would be narrower than the obligation deriving from draft article 12 (1) (a) as proposed by the Special Rapporteur in 1992. Under the second alternative the injured State would only be obliged to have recourse to conciliation, arbitration or judicial settlement envisaged by "relevant" treaties (in the narrow sense as explained above); under the third alternative it would only be obliged to have recourse to arbitration and judicial settlement envisaged by the said "relevant" treaties.

2. Paragraph 1 (b) of article 12 as formulated by the 1993 Drafting Committee

34. Paragraph 1 (b) provides for the case where no "relevant" settlement obligation existed between the parties in a responsibility relationship. In such a case, presumably a frequent one especially if the choice of the Commission were to fall upon the second or third of the alternatives left open by the Drafting Committee in paragraph (1) (a), 14/ the injured State is enjoined to offer to the other party resort to a dispute settlement procedure. Considering that the kind of procedure to be offered is defined in paragraph 1 (b) by the same square-bracketed language as appears in paragraph 1 (a), one faces again a number of alternatives. Here too, the main alternatives would seem to be three, namely: (i) any dispute settlement procedures; (ii) any third-party dispute settlement procedures; and (iii) only binding third-party dispute settlement procedures. 15/

35. According to the statement of the Chairman of the 1993 Drafting Committee, the possibility covered by paragraph 1 (b) of that Committee's formulation was not provided for in the Special Rapporteur's 1992 proposal. This is formally, and prima facie, correct, in the sense that that proposal did not envisage expressly the case where no dispute settlement procedures were available to the injured State by way of an applicable international legal rule. However, the tenor of article 12 as proposed by the Special Rapporteur in 1992 was such as to make the very possibility of such a "gap" in the parties' dispute settlement obligations extremely improbable, if not non-existent.

36. Indeed, by enjoining the injured State to have recourse to any dispute settlement procedures legally available under general international law, the Charter or any other dispute settlement instrument in force between the parties, the Special Rapporteur's text covered, unlike the restrictively interpreted "relevant treaties" formula, such a broad spectrum of dispute settlement procedures that the injured State would at least be bound to try negotiation, and thereby, if nothing else was "available", it could also propose to move to more effective means among those contemplated in Article 33, paragraph 1, of the Charter. The theoretical gap would thus be filled in practice thanks at least to the latter provision. A fortiori, the "gap" would be filled by the dispute

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14/ Paras. 33 supra and 38 infra.

15/ Ibid.

settlement obligations existing between the parties by virtue of general treaties of conciliation, arbitration or judicial settlement, or by virtue of compromissary clauses or declarations of acceptance of the ICJ's jurisdiction.

37. The real difference between the formulation of article 12 (1) (b) adopted by the Drafting Committee in 1993 and the text proposed by the Special Rapporteur in 1992 is not to be found in the above considerations. It resides, as explained above, in the temporal element. Under the 1992 text, any offer would have to precede resort to countermeasures. Under the 1993 text, an offer following or accompanying countermeasures would meet the prescribed requirement.

38. A further difference would arise if the plenum of the Commission, in finalizing the paragraph in question, chose to exclude the first alternative (any dispute settlement means), leaving open only the second (any third-party procedures) or the third (only binding third-party procedures). The injured State's offer would thus have to be restricted to more effective means than negotiation under the second alternative or conciliation under the third alternative. In that very modest measure, the solution proposed by the 1993 Drafting Committee might appear, were it not for the crucial "gap" represented by the "relevant" treaty clause in paragraph 1 (a), more demanding for the injured State. Considering, however, the temporal element, i.e. the fact that the injured State is not required to make a third-party or binding third-party settlement offer before resorting to countermeasures, that apparent advantage seems to be illusory. Be that as it may, it would be advisable that, before eliminating the first alternative, more careful consideration be given to the negative consequences that might arise from the exclusion of such an important means of settlement as negotiation.

3. Paragraph 2 of article 12 as formulated by the 1993 Drafting Committee

39. While abandoning the requirement of prior recourse to dispute settlement procedures, the 1993 Drafting Committee's formulation of article 12 does make an attempt to restrict the injured State's faculté to resort to countermeasures. To that effect, paragraph 2 of the article provides that that faculté is "suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased". The term "agreed" seems to refer, as explained by the Chairman of the 1993 Drafting Committee in his statement, "both to procedures under pre-existing obligations as envisaged in paragraph 1 (a) and to procedures accepted as a result of an offer under paragraph 1 (b)". 16/

40. It is difficult to analyse the function of this provision owing to some obscurities in the text.

41. The main obscurity derives from the fact that paragraph 2, unlike paragraph 1 (a) and (b), does not use the word "binding" in conjunction with the

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16/ A/CN.4/SR.2318, p. 9.

phrase "third-party". It would nevertheless seem that the intention of the Drafting Committee members who wished to leave out non-binding procedures was to exclude not only conciliation but also negotiation from the range of procedures the initiation of which would suspend the injured State's faculté to resort to countermeasures. The formulation of paragraph 2 as adopted by the Drafting Committee would thus embody two alternatives. Under one alternative, the said faculté would be suspended as a result of the implementation of an arbitration or judicial settlement procedure. Under the other alternative, it would also be suspended following the initiation of conciliation or negotiation.

42. Prohibiting the use of countermeasures while an amicable settlement is being pursued, and suspending any countermeasures already taken, seems to be a correct solution. It is also natural that the suspension should not be mandatory where the allegedly law-breaking State does not pursue the procedure in good faith. This requirement seems to be particularly appropriate when a settlement is being sought by negotiation or conciliation. It is less so, perhaps, where the parties are engaged in an arbitral or judicial procedure, where the procedural good faith of both parties is subject to the adjudicating body's vigilance and measures. The good-faith requirement would remain essential, however, first, in the phase of preparation of the arbitral or judicial procedure, secondly, in case of indication, by the tribunal, of interim measures of protection and thirdly, at the moment when the tribunal issued a decision which would have to be complied with in good faith by both sides.

43. We are less sure, for the reasons indicated in paragraph 20 supra, about the appropriateness of that second condition of suspension which would be, according to the Drafting Committee's formulation of paragraph 2, the cessation of the allegedly unlawful conduct on the part of the alleged wrongdoer.

44. As explained above, this requirement would be fully justified if there was no doubt as to the existence and attribution of the unlawful act. 17/ Here again, cessation should not ordinarily be dealt with any differently from reparation. Although this seems to be especially correct whenever the pending procedure is a third-party procedure, it should be the right solution even where negotiations are being pursued in good faith by the alleged wrongdoer. 18/

4. Paragraph 3 of article 12 as formulated by the 1993 Drafting Committee

45. According to paragraph 3 of the formulation of article 12 adopted by the 1993 Drafting Committee, "a failure by the [wrongdoing State] to honour a

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17/ Nor to the absence of any circumstances excluding wrongfulness.

18/ This point would be covered, we submit, not only by the "good-faith" reference in paragraph 2 (a) of draft article 12 as proposed by the Special Rapporteur in 1992, but also by the "adequate response" requirement indicated as a condition of lawful resort to countermeasures in draft article 11 as proposed by the Special Rapporteur in the same year. The latter concept was also set aside as too vague by the 1993 Drafting Committee. On these and other flexibility elements in the 1992 proposal, see infra. paras. 64-74 and 75-83.

request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures". Although the term "interim measure" does not appear, it is presumably to interim measures that this provision refers when it speaks of "a request or order emanating from the dispute settlement procedure", and it is surely appropriate that a failure by an allegedly wrongdoing State to comply with such a request or order should lift the suspension of the injured State's faculté to take countermeasures.

46. It must be noted, however, that the only dispute settlement procedures from which an interim measures "request or order" could emanate are third-party procedures, and in principle only judicial procedures. It follows that this provision might require some reconsideration in the event that the settlement procedures envisaged as suspending the right to take countermeasures (in paragraph 2 of article 12) were to include, once the alternatives within square brackets were resolved, any procedures not envisaging the possibility of interim measures. Such would be the case for negotiation and, in principle, ordinary conciliation and the ordinary forms of arbitration.

5. Main shortcomings of the formulation adopted by the 1993 Drafting Committee for article 12

47. In addition to the obscurities and uncertainties noted above, the main shortcomings of the formulation adopted by the 1993 Drafting Committee for article 12 leaving aside for the moment article 11, 19/ are, in our submission, the following.

48. First of all, the Drafting Committee's formulation almost totally fails to counterbalance the legitimation of unilateral countermeasures by sufficiently strict obligations of prior recourse to available amicable dispute settlement procedures. On the contrary:

(a) An allegedly injured State would remain free, under the future State responsibility convention, to resort to countermeasures prior to recourse to any amicable settlement procedure;

(b) Such a State would in addition only be obliged, except, of course, for the "offer" hypothesis envisaged in paragraph 2 (b) of the 1993 Drafting Committee's text, to have recourse (at any time it might choose) to such means as are provided by a "relevant" treaty (in the narrow sense as explained above);

(c) The obligation so narrowly circumscribed would be further narrowed down if the future State responsibility convention were to confine it to such means as third-party procedures or, even worse, to binding third-party procedures, thus overlooking the crucial role which is, and should be played by negotiation;

19/ For a discussion of some important elements of this article, see paras. 64 ff., especially 69 and 71 ff.

(d) Furthermore, the formulation adopted by the 1993 Drafting Committee completely ignores the problem of prior and timely communication, by the injured State, of its intention to resort to countermeasures. This requirement was set forth in paragraph 1 (b) of draft article 12 as proposed by the Special Rapporteur. According to the Drafting Committee's formulation, the injured State would instead be relieved of any burden of prior notification of countermeasures (and the law-breaker would be denied any opportunity for "repentance").

49. Secondly, but not less importantly, by not outlawing resort to countermeasures prior to recourse to dispute settlement procedures to which the injured State might be bound to have recourse under instruments other than the State responsibility convention itself (which is all that was envisaged in the 1985-1986 and 1992 proposals), the formulation of the 1993 Drafting Committee would seem to relieve such States, in so far as the State responsibility convention is concerned, from their dispute settlement obligations. The mere fact of not requiring recourse to available dispute settlement procedures prior to countermeasures, which inevitably undermines the said dispute settlement obligations, would be further aggravated by (a) the "relevant" treaties clause and (b) the exclusion of given dispute settlement procedures under the second and third alternatives discussed above. The consideration of the crucial issue of requiring prior recourse to dispute settlement procedures is addressed in section B below.

B. The crucial issue of the requirement of prior recourse to dispute settlement procedures

50. However difficult it may be to make significant steps forward in the development of both the law of State responsibility and the law of dispute settlement, one cannot fail to be impressed by the degree to which the formulation adopted by the 1993 Drafting Committee for article 12, not to mention article 11, 20/ falls short of any measure of progress in such vital areas. Indeed, that formulation marks a major departure not only from the essential features of the proposals of the present Special Rapporteur which were referred to the Drafting Committee in 1992, but also from those of the not very dissimilar draft article 10 proposed by his predecessor and referred to the Drafting Committee almost a decade ago. While ready to abide, as he obviously must, by any choices of the Commission, the Special Rapporteur also feels duty bound fully to express his views before a final choice is made. This is especially true with regard to such a difficult and delicate matter as the relationship to be established, in the State responsibility draft, between the right of an injured State to take unilateral countermeasures and its dispute settlement obligations.

51. The requirement of "prior recourse to dispute settlement procedures" is, in our view, as indispensable to the State responsibility convention as the rules

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20/ For a discussion of one of the questionable elements in the formulation adopted by the 1993 Drafting Committee for article 11, see infra, para. 69.

setting forth the admissibility and regulation of countermeasures. Although the latter point has been emphatically contested (for presumably different reasons), first, by some members of the Commission itself 21/ and, later, by various representatives in the Sixth Committee in 1992, 22/ it would be extremely difficult to accept the notion that the draft should confine its treatment of the consequences of internationally wrongful acts to the rights and obligations relating to cessation and reparation. Whether the injured State's prerogative to resort to reprisals or countermeasures is technically qualified as a right or a faculté, it represents an integral part of the consequences of an internationally wrongful act under any theory of international responsibility. In particular, the prerogative in question remains an integral part of the said consequences regardless of whether it is classified as a "substantive" or, much more appropriately, as an "instrumental" consequence of an internationally wrongful act. To say that the regime of countermeasures should not be covered by the State responsibility convention would be tantamount to saying that countermeasures are not contemplated by customary rules of international law as a right or faculté of an injured State. Furthermore, it would be tantamount to saying that customary international law does not impose conditions and restrictions in the use of countermeasures. 23/

52. If the draft is to cover the regime of countermeasures, as the Commission and the Drafting Committee itself have agreed without difficulty that it should, then it must also provide for some measure of dispute settlement obligations. Of course, the nature of the dispute settlement obligations to be envisaged in the draft depends to some extent on the degree of progressive development one wants to achieve. In this regard, the Commission, as an international "legislator", will need to decide whether to follow the maximalist or the minimalist approach discussed in our fifth report. 24/

53. It is essential that the State responsibility convention include as a minimum the dispute settlement obligations that would be necessary to preserve the validity and effectiveness of any such obligations by which the allegedly injured State is bound under international rules other than those contained in the State responsibility convention. Otherwise, the very fact of declaring the

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21/ See the report of the International Law Commission on the work of its forty-fourth session (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10, (A/47/10)), paras. 124 ff.

22/ See, for example, the statement made by the representative of France at the forty-seventh session of the General Assembly, document A/C.6/47/SR.26, paras. 5 ff.

23/ Countermeasures would thus be, and should remain, outside the realm of the law - a manifestly absurd proposition. One would have to wonder, if such were the case, whether countermeasures were not addressed in the convention because they were unlawful, as suggested by some members of the Commission, or because they were lawful a priori and thus not amenable to any control or regulation, as suggested by some representatives in the Sixth Committee.

24/ See A/CN.4/453, paras. 61 ff.

ipso facto admissibility of countermeasures on the mere condition of the existence of an internationally wrongful act would in effect nullify the dispute settlement rules by which the future States parties are bound. Since the dispute would most likely be settled by the solution imposed on the wrongdoer by means of countermeasures, there would be little or no role for dispute settlement procedures. Such would be the result if the convention were to legitimize countermeasures without requiring prior resort to available, namely legally prescribed, dispute settlement means. Such would precisely be the effect of a convention including a provision such as paragraph 1 (a) of article 12 as formulated by the 1993 Drafting Committee.

54. To avoid any misunderstanding with regard to the nature of the requirement of "prior recourse to dispute settlement procedures", it is important to emphasize that such a requirement (as formulated in paragraph 1 (a) of draft article 12 as well as, mutatis mutandis, article 10 as proposed by our predecessor in 1985-1986) would not impose any new dispute settlement obligations upon the States ultimately participating in a State responsibility convention. Such a provision would merely preserve any settlement obligations of an allegedly injured State existing independently of the State responsibility convention from the otherwise inevitable negative implications resulting from the codification of the admissibility of countermeasures.

55. Arguably, the provision in question is not even really a matter of progressive development. In this respect, a marked difference must be emphasized between article 12 of Part Two and the draft articles of Part Three. The latter articles would introduce new settlement obligations which would clearly constitute progressive development. In contrast, draft article 12 as proposed by the Special Rapporteur would merely preserve and prevent any undermining, or even restrictive interpretation of existing dispute settlement rules the object of which is to ensure more impartial and just solutions than those that would be imposed by coercion. The States participating in the convention would not be subject to any additional dispute settlement obligations by virtue of article 12, which does not create new dispute settlement obligations but merely preserves any existing such obligations as well as the possibility of their further development.

56. To use an image, the exclusion of a provision such as paragraph 1 (a) of draft article 12 as proposed by the Special Rapporteur 25/ would entail not so much lucrum cessans in terms of the progressive development of the international law of dispute settlement, 26/ but also, to a very serious degree, damnum emergens, as is briefly explained below.

57. The negative impact of the absence, in article 12 of Part Two of the draft, of a requirement of "prior recourse to dispute settlement procedures" is more serious than it may appear to be. It could be argued, prima facie, that the

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25/ Or, mutatis mutandis, draft article 10 proposed by the previous Special Rapporteur in 1985-1986.

26/ Such lucrum cessans would occur if Part Three were not adopted or were significantly curtailed.

fact that a State responsibility convention did not require prior recourse to dispute settlement procedures provided for by instruments in force between the parties, as would be the case under the formulation adopted by the 1993 drafting Committee for paragraph 1 (a) article 12, would not affect the parties' obligations under such instruments. It could be argued, for example, that since armed reprisals are prohibited - a rule of customary law that the convention could not fail to codify - the countermeasures to which an injured State might lawfully resort should not contravene the general (and practically universal) obligation to settle disputes by peaceful means as embodied in Article 2, paragraph 3, of the Charter of the United Nations. There can be no doubt that lawful countermeasures must be limited to peaceful ones under article 14 of Part Two of the draft.

58. We wonder, however, whether such a consideration dispels any doubt. Leaving aside the question of the extent to which resort to countermeasures prior to recourse to dispute settlement procedures would be compatible with that further requirement of Article 2, paragraph 3, of the Charter that international disputes must be settled in such a manner "that international peace and security, and justice, are not endangered", 27/ the legitimization of countermeasures embodied in the formulation adopted by the 1993 Drafting Committee for article 12 (1) (a) does not seem to be compatible with positive dispute settlement obligations. We refer, for example, to the general obligations of all Member States set forth in Article 33 of the Charter as well as to any specific obligations binding States in an actual or alleged responsibility relationship as a result of their bilateral dispute settlement treaties or compromissary clauses. Notwithstanding the "free choice" of means principle under the generally accepted interpretation of Article 33, paragraph 1, of the Charter, it is difficult to accept the notion that resort to countermeasures before seeking a solution by one of the means listed in Article 33, paragraph 1, of the Charter would be compatible with existing customary law or the Charter. 28/

59. Immediate resort to countermeasures would be clearly incompatible with a specific treaty or a compromissary clause providing for the arbitration of legal disputes not settled by diplomacy. This would be particularly true in the presence of a jurisdictional link between the States concerned deriving from

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27/ This point was covered by the ill-fated Special Rapporteur's draft article 12, paragraph 3 (infra, paras. 61 and 68).

28/ It could hardly be argued that since Article 33, paragraph 1, refers to disputes "the continuance of which is likely to endanger the maintenance of international peace and security", many disputes arising in the area of State responsibility would not be of such a nature as to fall under the general obligation set forth in that provision. The first paragraph of the second principle of the Friendly Relations Declaration, which is surely not insignificant for the purposes of a contemporary interpretation of the Charter, should dispose of any such argument at least for a United Nations body like the Commission (if not de lege lata at least de lege ferenda). For a discussion of the relevant provision contained in the Helsinki Final Act, see para. 61 (c) infra.

their recognition "as compulsory ipso facto and without special agreement" of the "jurisdiction of the [International Court of Justice] in all legal disputes concerning" either "the existence of any fact which, if established, would constitute a breach of an international obligation" or "the nature or extent of the reparation to be made for the breach of an international obligation". 29/ According to most dispute settlement instruments, the "triggering mechanism" of the settlement obligation, namely, of the obligation to have recourse to the envisaged procedure, is the existence of a dispute not settled by "negotiation" or by "diplomacy". It is difficult to imagine that resort to countermeasures could be considered to be part of negotiation or diplomacy.

60. It is important to note that the limitative reference to relevant treaties in article 12, paragraph 1 (a), as formulated by the Drafting Committee would not only undermine a considerable part of the existing and future conventional instruments on amicable dispute settlement, but would also cast an "authoritative" doubt over any existing rules of general international law on the subject.

61. There are several important issues that require serious consideration with regard to the present state of the law of dispute settlement and its development:

(a) Assuming that Article 2, paragraph 3, of the Charter of the United Nations has become a principle of customary international law, the continuing existence and further development of such a principle may be affected by a provision contained in a general codification convention (or even, for that matter, a draft codification convention prepared by the Commission) which authorizes any allegedly injured State to resort to countermeasures ipso facto, namely without any prior attempt to settle the dispute by negotiation or any available third-party procedures (and even without any prior communication). This raises the question whether Article 2, paragraph 3, of the Charter has merely the negative effect of condemning resort to non-peaceful means or also, as we are inclined to believe, the positive effect of requiring the use of available settlement means with a view to achieving "justice". The authorization to disregard available settlement procedures, such as those expressly referred to in the Charter, may affect the degree of justice attained in an eventual settlement. 30/ Even if the continued validity of the general principle in question is not affected, paragraph 1 (a) of the text under review may hinder its further development;

(b) There is also the question of the extent to which the Commission can or should ignore the relevant resolutions, namely the Friendly Relations Declaration and the Manila Declaration, adopted by the General Assembly, of which the Commission is a subsidiary organ. Given this relationship, these

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29/ Article 36, paragraph 2, of the Statute of the International Court of Justice.

30/ The reference to justice was covered, in the Special Rapporteurs 1992 proposal, by paragraph 3 of article 12. On this provision see paras. 68 infra (and 58 supra).

solemn declarations should arguably have a decisive impact on any dispute settlement provisions to be embodied by the Commission in its draft, notwithstanding the non-binding character of those declarations;

(c) Furthermore, there is the question of the extent to which the Commission should take into consideration the provision of the second paragraph of principle V of the 1975 Helsinki Final Act's decalogue, according to which litigant states "will endeavour in good faith and a spirit of cooperation to reach a rapid and equitable solution on the basis of international law". 31/ The members of the Conference on Security and Cooperation who participated in the drafting of the Final Act were generally of the view that the principles embodied in the decalogue were in full conformity with the law of the Charter of the United Nations. This gives rise to the more specific question of whether the paragraph quoted constitutes a significant step in the development of the United Nations law of dispute settlement or whether the requirements of good faith and a spirit of cooperation referred to therein can be overlooked. There would appear to be an inherent contradiction between the idea of a good-faith attempt to reach a rapid solution in a spirit of cooperation on the basis of international law, on the one hand, and the idea of immediate resort to countermeasures, on the other. Whether the phrase "on the basis of international law" refers to substantive or procedural law, or both, this reference would presumably have at least some impact on the conditions required for lawful resort to countermeasures, namely that existing dispute settlement obligations should be complied with before resorting to countermeasures.

62. To conclude the discussion of this crucial question, the present issue is not whether any requirement of prior resort to dispute settlement procedures should be embodied in article 12 of Part Two of the State responsibility draft by way of progressive development of the law of dispute settlement or of the law of State responsibility. That issue is one that the Commission will have to tackle in dealing with Part Three of the draft, namely with dispute settlement procedures after the taking of countermeasures. The present issue which arises in the context of article 12 is whether a State responsibility draft should not completely rule out any provisions the adoption of which by the Commission and eventually by States would undermine the effectiveness of dispute settlement procedures which, in addition to being prescribed by existing rules, are by nature more likely to lead to impartial and just solutions than unilateral measures. 32/ Given the significance generally attributed to the draft

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31/ Emphasis added.

32/ It is evident that dispute settlement procedures and countermeasures differ dramatically in terms of the propensity to ensure a proper implementation of the law. Dispute settlement procedures, particularly third-party procedures, are by nature the most likely to ensure a correct and equitable solution of any dispute. As for countermeasures, they are surely intended in theory as an acceptable "device" of general international law to redress the wrongdoing. Their nature, however, makes them very questionable as a means of enforcement of rights. In the first place, they present the undesirable feature of legitimizing breaches of international obligations. Secondly, and most importantly, the unilateral nature of countermeasures is likely to favour the

articles emanating from the Commission, the negative consequences would be felt not only at the time of adoption of the future State responsibility convention, but already at the step of adoption on first reading of article 12 as formulated by the 1993 Drafting Committee. This would strike a severe blow to the existing international law of dispute settlement, as well as to the prospects for the further development of that law during the period required to complete the second reading and ultimately to adopt the State responsibility convention, possibly at a diplomatic conference.

63. With all due respect, we believe that the limited number of members of the 1993 Drafting Committee who favoured the abandonment of the requirement of "prior recourse to dispute settlement procedures" in article 12 of Part Two could usefully be invited by the Commission to give further consideration to this question in the light of the preceding paragraphs as well as to the relevant discussion contained in the fourth report. 33/ It is our humble but considered view that they may have simply overlooked the inevitable impact of the codification of countermeasures on the international law of dispute settlement and its future development. It is vital to stress that the law of dispute settlement is the area of international law where progress is less difficult to achieve than in such impervious areas as law-making and collective security. 34/ It follows that, even if one assumed, as we are unable to do, that the obligation to settle disputes by given means does not imply at present the obligation not to resort to countermeasures prior to recourse to dispute settlement procedures, it would still be imperative, for a body like the Commission, to provide for that obligation so as to avoid at the very least hindering progressive development in the area of dispute settlement.

C. Other important matters relating to the pre-countermeasures dispute settlement issues to be dealt with in article 12 of Part Two

64. Assuming we have managed to express our position more clearly with regard to the requirement of "prior recourse to dispute settlement procedures", we can now take a fresh look at the main controversial elements of draft article 12 as proposed and discussed since 1992, namely: (a) the terms "exhaustion", "all" and "available" in paragraph 1 (a) of that draft article; (b) the reference to "interim measures" in paragraph 2 (b); (c) the so-called "exception to the exceptions" set forth in paragraph 3; (d) the expression "adequate response" in

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more powerful States to the detriment of the less powerful States. These and other drawbacks of countermeasures were exhaustively denounced, as noted in the Special Rapporteur's fifth report (A/CN.4/453, para. 8 ff.), by a very great majority of representatives in the Sixth Committee debate of 1992.

33/ See A/CN.4/444, paras. 24-51, especially 32 ff.

34/ This widely shared view is illustrated in masterly fashion in Hans Kelsen's invaluable Peace through Law (University of North Carolina Press, 1944), esp. pp. 13 ff. (as opposed to pp. 3-13) and passim, as well as in the author's earlier works cited at pp. 14-15.

draft article 11, as proposed in 1992; and, more generally, the importance of maintaining a degree of flexibility in the provisions of article 12 (as ensured by the above terminology). Further consideration is also suggested with regard to the requirement of a prior communication or notification of the countermeasures.

1. Use of the terms "exhaustion", "all" and "available"

65. The concern of some members, expressed in the 1992 debate, over the excessively demanding tenor of paragraph 1 (a) of article 12 focused in particular on the terms "exhaustion" and "all". These terms would have implied, in the opinion of those members, too lengthy a process for the injured State to follow before being allowed to resort to a unilateral measure. The intention of the Special Rapporteur, which perhaps could have been clarified in the Drafting Committee, was not to impose upon an allegedly injured State the unbearable burden of successively exhausting all of the dispute settlement procedures listed, for example, in Article 33 of the Charter. The intention was to call for a serious effort to make full use of any dispute settlement procedures available to the States concerned, based on their existing treaty obligations in the light of the Friendly Relations Declaration and other relevant instruments.

66. As for the term "available", we understood this term to be used in a rather broad sense. With regard to draft article 10 proposed by the previous Special Rapporteur in 1985-1986, the term "available" appears to have been intended to cover only those (possibly binding) third-party procedures that could be unilaterally initiated by the injured State. The present Special Rapporteur understood the term more broadly as covering all dispute settlement procedures available under any multilateral or bilateral treaty in force between the parties. The term "available" used in that sense would also include negotiation and conciliation. The requirement of availability was not intended to be understood merely in the sense of a purely legal availability. It should also be measured on the basis of the degree of the law-breaking State's disposition towards the use of settlement procedures such as negotiation, conciliation or even arbitration, which cannot be initiated unilaterally. Thus, paragraph 1 (a) should have been read in conjunction with both the "good-faith" requirement spelled out in paragraph 2 (a) of the same draft article and the "adequate response" condition indicated in draft article 11. Admittedly, this interrelationship was not clearly spelled out in the proposed text. However, a more satisfactory way to express the idea could have been found if the Drafting Committee had been able to devote more time to the matter.

2. Use of the term "timely communication"

67. It will be recalled that draft article 12 (1) (b) as proposed by the Special Rapporteur in 1992 provided that the injured State should communicate its intention to resort to countermeasures to the law-breaking State in a timely manner. Since the 1993 Drafting Committee may have overlooked the question of prior notification as a result of lack of time during the session, the point could usefully be taken up at the coming session.

3. Exceptions to the requirement of "prior recourse to dispute settlement procedures"

68. The exceptions to the requirement of "prior recourse to dispute settlement procedures" set forth in subparagraphs (b) and (c) of paragraph 2 of article 12 (concerning interim measures and reaction to non-compliance with an interim measure of protection ordered in the framework of a "third-party" settlement procedure) would not be applicable wherever the measures envisaged were not in conformity with the obligation spelled out in Article 2, paragraph 3, of the Charter of the United Nations. The Special Rapporteur initially abandoned this provision, which was considered to be unclear by some members of the Commission. On reflection, however, he believes that the provision should be reconsidered. It is meant to be one of the elements of flexibility referred to in subsection 1 above and subsection 6 below. It is also important from the viewpoint of the progressive development of the law of both State responsibility and dispute settlement. 35/

4. Use of the term "adequate response"

69. One of the main changes introduced by the 1993 Drafting Committee in draft article 11 as proposed by the Special Rapporteur in 1992 has been the elimination of the concept of "adequate response", which figured prominently in that draft. The proposed provision would have allowed the alleged lawbreaker to escape countermeasures by accepting in principle some degree of responsibility for the wrongful act or continuing negotiations on the question. The allegedly injured State would be precluded from resorting to countermeasures as long as the allegedly wrongdoing State at least pursued dialogue in good faith. This possibility seems to be excluded by the formulation adopted by the 1993 Drafting Committee for article 11. According to that formulation, the allegedly injured State's faculté to resort to countermeasures would continue "as long as" the alleged lawbreaker "has not complied with its obligations" of cessation or reparation. Countermeasures, and not just interim measures, would seem thus to be admissible even where the alleged lawbreaker responded in a positive way, albeit not yet finally or completely, to the allegedly injured State's protests or demands. In other words, the "failure to comply" formula gives the injured State too much discretion in resorting to countermeasures notwithstanding the willingness of the wrongdoing State to attempt to resolve the matter. First, with regard to cessation, this phrase implies that an injured State may resort to countermeasures as from the very first moment that it believes, rightly or wrongly, that a continuing wrongful act is being committed by the allegedly wrongdoing State, without any opportunity being given to the wrongdoer to explain, for example, that there is no wrongful act or that the wrongful act is not attributable to it. The notion of an "adequate response" would provide more of an opportunity for dialogue. Secondly, with regard to reparation, the "failure to comply" condition seems to mean that countermeasures would be allowed to continue until the wrongful State had made full reparation for the injury resulting from the wrongful act. Unless the wrongdoing State is capable of instantaneously providing full and complete reparation, which would most

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35/ Paras. 58 and 61, supra.

likely be exceptional, it might continue to be a target of countermeasures even after full admission of liability and even while in the process of providing reparation and/or satisfaction.

70. It is submitted that this provision could also be usefully reconsidered in the Drafting Committee at the coming session.

5. A few remarks on the need for flexibility

71. Much as one may wish to see the imperfections of the present inter-State system compensated by precise, clear-cut rules to be easily applied by States themselves, the absence of effective institutions is an obstacle to the very acceptance of such rules. International legal rules are thus characterized by a relatively higher degree of generality and vagueness than the rules of municipal law. For this reason, the rules of the inter-State system often rely on such concepts as "reasonable", "due", "appropriate", "adequate", or, with regard to the regime of countermeasures, "adequate response" (draft article 11), the lawbreaking State's "good-faith" cooperation in the implementation of settlement procedures (draft article 12), the "availability" of such procedures (paragraph 1 (a) of draft article 12), as well as such imprecisely defined terms as "interim measures" of protection (paragraph 2 of draft article 12) and "justice" (paragraph 3 of draft article 12).

72. The function of these concepts is, in our view, to limit the constraints inherent in the requirement of prior resort to available dispute settlement procedures contained in article 12 (1) (a). 36/ In addition to responding to the concerns expressed by some, the Special Rapporteur wished to incorporate in the said requirement some flexible elements which would permit adjustment to the objective and subjective circumstances of each case.

73. The requirement would of course be applied by the party or parties who would be called upon to give effect to the relevant articles at various stages in a given case, as follows: first of all the allegedly injured State, following its demand of cessation/reparation; secondly, the allegedly lawbreaking State in responding to the other party's demand; thirdly, the allegedly injured State again, when reacting to the other side's response, and so on. At one point, application of the requirement to a particular case may be the subject of a disagreement between the parties, which may be followed by resort to countermeasures and the beginning of their dispute thereon. Failing an agreed solution, the application of the requirement of resort to dispute settlement procedures would result in the involvement of a third party (conciliation commission, arbitral tribunal or ICJ) competent to deal with the dispute under the relevant provisions of Part Three (as proposed by the Special Rapporteur in 1993).

36/ A further element of flexibility might be achieved, perhaps, by deleting the word "all" in paragraph 1 (a) and finding a less stringent substitute for the word "exhaust".

74. While the Special Rapporteur is unable to determine with certainty whether the above-mentioned elements of flexibility were the right ones, he thought that he had done his tentative best in the belief that either the plenum or the Drafting Committee would reflect on the meaning and impact of each one of those elements with a view to providing constructive criticism and improving the text. It is not too late to make such an effort.

6. The important issue of interim measures

75. Something more needs to be said, mainly but not exclusively in the context of the problem of pre-countermeasures dispute settlement, on the role that may or should be played by interim measures. One must of course distinguish between interim measures indicated or ordered by a third party and interim measures taken unilaterally by the injured State.

76. Beginning with the former, the general rules on the subject of the United Nations are the well-known Article 41 of the Statute of the International Court of Justice and Article 40 of the Charter of the United Nations, both of which use the expression "provisional measures". In the Special Rapporteur's proposals, interim measures resulting from a third-party procedure are envisaged mainly in Part Three, namely, within the framework of post-countermeasures dispute settlement obligations. Under the provisions of that Part, the third party called upon to resolve a post-countermeasures dispute would be empowered by the future convention to order interim measures. This would apply to the conciliation commission as well as to the arbitral tribunal or the International Court of Justice. Third-party indications or orders of interim measures are also considered, together with unilateral interim measures, in the text proposed in 1992 by the Special Rapporteur for article 12, paragraph 2 (b).

77. As regards unilateral interim measures, resort thereto by the injured State is contemplated in the Special Rapporteur's proposal of 1992 as an exception to that State's obligation of prior recourse to available dispute settlement procedures. The injured State's faculté to adopt unilateral interim measures is restrictively qualified - under paragraph 2 (b) of the above-mentioned article - by two conditions. One condition is that the object of the measure be the protective purpose which is inherent in the concept of interim measures. This requirement would be met, for example, by a freezing, as distinguished from confiscation and disposal, of a part of the allegedly lawbreaking State's assets; by a partial suspension of the injured State's obligations relating to customs duties or import quotas in favour of the allegedly lawbreaking State; or, more generally, by recourse to the inadimplenti non est adimplendum principle to be applied, of course, as a provisional measure. The second requirement is that the injured State's faculté to adopt interim measures can only be exercised temporarily, namely "until the admissibility of such measures has been decided upon by an international body within the framework of a third party settlement procedure".

78. Considering that the concept of interim measures of protection might prove to be too vague, as rightly pointed out by some members in the course of the 1992 debate, some further precision could be achieved in the paragraph in order to reduce the possibility of abuse by the injured State. Although interim

measures are not easy to define in abstracto, a serious attempt at definition could be made by the 1994 Drafting Committee.

79. Be that as it may, even with a more precise definition, a high degree of discretion will inevitably remain with the injured State. This is however no good reason, for the opponents of the requirement of prior recourse to dispute settlement procedures who are apparently anxious to preserve the injured State's prerogatives, to delete any reference to the possibility of unilateral interim measures. Interim measures were contemplated in the Special Rapporteur's draft proposal precisely in order to add some flexibility, in the interest of the injured State, to a demanding requirement of "prior recourse to dispute settlement procedures". The result was thus more balanced, in our view, than it appears to be in the formulation adopted by the 1993 Drafting Committee.

80. Three factors should, in any case, induce the injured State's authorities to show reasonable restraint in availing themselves of the interim measures derogation.

81. One factor should be an accurate, bona fide assessment, by the injured State, of the alleged wrongdoer's response to the demand for cessation/reparation. This factor is relevant to several aspects of the Special Rapporteur's proposals of 1992 with regard to any kind of countermeasures, including, of course, interim measures. It is, first, inherent in the general concept of an "adequate response" from the allegedly lawbreaking State (in draft article 11). 37/ It furthermore appears in paragraph 2 (a) with respect to the condition of good faith on the part of the lawbreaking State in the choice and implementation of available settlement procedures.

82. A second factor, within the framework of the Special Rapporteur's proposals of 1992, is the ruling out, in paragraph 3 of article 12, of any measure (including an interim measure) "not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered". 38/

83. The third and most important factor is represented, again within the framework of the Special Rapporteur's proposals of 1992, by the post-countermeasures dispute settlement system of Part Three of the draft. Any third-party body called upon to deal with a dispute under Part Three (conciliation commission, arbitral tribunal or the Court) would be empowered by the future convention not only, as noted above, to order interim measures but also to suspend any measures previously taken by the allegedly injured State.

37/ See supra, para. 69.

38/ Paras. 58, 61 and 68 supra.